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Juta Damai Sdn Bhd v Permodalan Negeri Selangor Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO B-02–796–04 OF 2012
ABDUL WAHAB PATAIL, ZAWAWI SALLEH AND UMI KALTHUM JJCA
17 MARCH 2014

Contract — Agreement — Breach — Joint venture agreement — Vacant possession — Failure to deliver — Obligation to deliver vacant possession within six months — Non-performance of reciprocal promise — Whether respondent entitled to assert appellant failed to perform its part of bargain — Appeal from High Court — Whether High Court considered s 55 of the Contracts Act 1950 — Whether irrelevant considerations taken into consideration — Whether appellant could claim damages from respondent for breach of joint venture agreement — Whether High Court erred in dismissing claim for special damages — Whether loss of profits proven — Whether appellant could claim damages from respondent for breach of joint venture agreement

The appellant and the respondent entered into a joint venture agreement ('JVA') and a supplementary agreement. The appellant undertook a housing, commercial and industrial development including public amenities and infrastructure on a piece of land. The respondent informed the appellant that the JVA had expired and would not be renewed. This caused the appellant to file and action in the High Court on the ground that the termination was wrongful and that the respondent had breached the JVA by failing to deliver vacant possession of the land. The appellant submitted that they were not able to start preliminary works as the land was occupied by a third party carrying out sand mining activities; it had suffered losses amounting to RM5,504,527.49 being the expenses incurred by the appellant for the preliminary works in respect of the development; and loss of profit in the sum of RM21,486,263.75 based on the appellant's entitlement under the supplementary agreement for houses, buildings and/or land lots amounting to RM52,341,263.75. The High Court held that the delay and the reason why the appellant was not ready to commence development was because of the lack of demand for industrial premises and not vacant possession. It was further held that there was no issue of the appellant claiming for damages from the respondent for breach of the JVA. Hence, the present appeal.

Held, allowing the appeal:

(1) Vacant possession was sought to enable the surveyors to conduct survey of the land to enable the appellant to proceed with site preparations and

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designs before contracting and construction could begin. The failure to give vacant possession herein was evidenced by letters by the appellant's consultant engineers. A breach of the JVA by the respondent was not a disputed fact. The respondent had ignored the fact that cl 20, that time was of the essence, equally applied to its own obligation under cl 3(iii) to give vacant possession within six months of the JVA. This led the High Court astray, causing failure to appreciate the facts correctly and led the High Court to the failure to consider s 55 of the Contracts Act 1950 as to breach by the respondent of its reciprocal promise to give vacant possession (see paras 16 & 28).

(2) The non-performance of the respondent's reciprocal promise to give vacant possession within six months, or at least when requested by the appellant disentitled the respondent from asserting that the appellant failed to perform its part of the bargain. The High Court had taken into consideration irrelevant considerations which affected the merits of its decision (see para 31).

(3) The probabilities of the appellant's claim on quantum were based on evidence of witnesses whose testimony were not strongly challenged and were not discredited by cross-examination, and supported by invoices. The respondent's case was only a challenge to prove it, and that they were costs under the JVA to be borne by the appellant. There was nothing placed in evidence by the respondents on its side of the scale on the 'balance of probabilities' that such expenses were not incurred. Thus, placed upon the 'balance of probabilities' and however much the evidence adduced by the appellant was sought to be doubted, the scales tilt in favour of the appellant when there was nothing placed on the scale for the respondent. The High Court had erred in dismissing the claim for special damages but had re-adjusted the sum of RM5,504,527.49 to RM4,950,527.49 (see paras 41–42).

(4) Since the sum was fixed and not determined by market values at the time of default, the figures were accepted by the parties to the JVA and the supplementary agreement and was binding upon them. It was not a mere estimate. Hence, the appellant was entitled to rely upon this accepted sum as the best available evidence when proof of actual loss was not available in the determination of the loss of gross profit suffered. The High Court was led to error to hold that the appellant had failed to prove loss of profits of RM21,813,930.022. However, the appellant's written evidence had asserted at a reduced viability. It was for the court to nominate a figure to set the nominal reduction and therefore a nominal reduction was fixed at 30%. Judgment was therefore entered for the appellant (see paras 50 & 51).

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[Bahasa Malaysia summary

Perayu dan responden memeterai satu perjanjian usaha sama ('PU') dan perjanjian tambahan. Perayu mengakujanji pembangunan perumahan, komersial dan perindustrian termasuk kemudahan awam dan infrastruktur di atas sebidang tanah. Responden memaklumkan perayu bahawa PU telah tamat tempoh dan tidak akan diperbaharui. Perayu memfailkan tindakan di Mahkamah Tinggi atas dasar bahawa pembatalan adalah salah di sisi undang-undang dan responden telah melanggar PU atas kegagalan memberikan milikan kosong tanah tersebut. Perayu berhujah bahawa mereka tidak dapat memulakan kerja awalan memandangkan tanah telah diduduki pihak ketiga yang menjalankan kegiatan perlombongan pasir; ia telah mengalami kerugian berjumlah RM5,504,527.49 iaitu perbelanjaan yang ditanggung oleh perayu untuk kerja awalan berkaitan dengan pembangunan tersebut; dan kehilangan keuntungan berjumlah RM21,486,263.75 berdasarkan hak perayu di bawah perjanjian tambahan untuk rumah, bangunan dan/atau lot-lot tanah berjumlah RM52,341,263.75. Mahkamah Tinggi memutuskan bahawa kelewatan dan sebab mengapa perayu tidak bersedia untuk memulakan pembangunan adalah kerana kurang permintaan untuk premis perindustrian dan bukan milikan kosong. Adalah diputuskan selanjutnya bahawa tidak terdapat isu perayu menuntut pampasan daripda responden kerana memungkiri PU. Justeru, rayuan ini.

Diputuskan, membenarkan rayuan:

(1) Milikan kosong adalah dituntut untuk membolehkan juruukur menjalankan tinjauan terhadap tanah untuk membolehkan perayu meneruskan persiapan dan rekaan kawasan sebelum kontrak dan pembinan bermula. Kegagalan untuk menyerahkan milikan kosong dibuktikan oleh surat-surat oleh perunding kejuruteraan perayu. Kemungkiran PU oleh responden bukanlah fakta yang dipertikaikan. Responden telah tidak mengendahkan fakta bahawa klausa 20, pada masa matan, secara saksama terguna pakai terhadap kewajipannya tersendiri di bawah klausa 3(iii) untuk memberikan milikan kosong dalam tempoh enam bulan PU. Ini menyebabkan Mahkamah Tinggi terkhilaf, menyebabkan kegagalan untuk mempertimbangkan fakta-fakta dengan betul dan seterusnya kegagalan Mahkamah Tinggi untuk mempertimbangkan s 55 Akta Kontrak 1950 berkenaan pelanggaran janji bersilang responden untuk menyerahkan milikan kosong (lihat perenggan 16 & 28).

(2) Kegagalan pelaksanaan janji salingan responden untuk memberikan milikan kosong dalam tempoh enam bulan, ataupun sekurang-kurangnya apabila diminta oleh perayu menyebabkan responden tidak berhak untuk menegaskan bahawa perayu gagal untuk melaksanakan bahagian mereka dalam perjanjian. Mahkamah Tinggi

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telah mempertimbangkan pertimbangan yang tidak relevan yang mana menjejaskan merit keputusannya (lihat perenggan 31).

(3) Kebarangkalian tuntutan perayu atas kuantum adalah berdasarkan keterangan saksi yang mana keterangannya tidak dicabar dengan bersungguh-sungguh dan tidak menimbulkan kesangsian semasa pemeriksaan balas, dan disokong oleh invois. Kes responden hanyalah cabaran untuk membuktikannya, dan bahawa terdapat kos di bawah PU yang ditanggung oleh perayu. Tiada apa-apa yang ditempatkan pada keterangan oleh responden-responden atas skala 'balance of probabilities' bahawa perbelanjaan tersebut tidak ditanggung. Justeru, berdasarkan 'balance of probabilities' dan bagaimana banyak keterangan yang dikemukakan oleh perayu diragui, skala lebih berpihak kepada perayu apabila tiada apa-apa yang diletakkan pada skala responden. Mahkamah Tinggi telah terkhilaf dengan mengetepikan tuntutan untuk ganti rugi khas tetapi telah mengubahsuaikan jumlah RM5,504,527.49 kepada RM4,950,527.49 (lihat perenggan 41–42).

(4) Memandangkan jumlah tersebut telah diubah dan tidak ditentukan oleh nilai pasaran pada masa itu, jumlah-jumlah tersebut telah diterima oleh pihak-pihak PU dan perjanjian tambahan dan terikat terhadap mereka. Ia bukanlah sekadar anggaran. Justeru, perayu berhak untuk bergantung kepada jumlah yang diterima ini sebagai keterangan terbaik yang wujud apabila bukti kerugian sebenar tidak wujud dalam menentukan kehilangan keuntungan kasar yang dialami. Mahkamah Tinggi khilaf dalam memutuskan bahawa perayu telah gagal untuk membuktikan RM21,813,930.022. Walau bagaimanapun, keterangan bertulis perayu telah menunjukkan kekurangan daya maju kewangan. Adalah bagi mahkamah untuk memberikan jumlah yang untuk menetapkan pengurangan nominal dan oleh itu pengurangan nominal ditetapkan pada kadar 30%. Penghakiman oleh itu dimasukkan untuk perayu (lihat perenggan 50–51).]

Notes

For a case on breach, see 3(2) *Mallal's Digest* (4th Ed, 2013 Reissue) para 2962.

Cases referred to

Dial Kaur a/p Tara Singh v Mann Foong Realty Sdn Bhd [2000] 3 MLJ 153; [2000] 4 CLJ 93, CA (refd)

Gimstern Corporation (M) Sdn Bhd & Anor v Global Insurance Co Sdn Bhd [1987] 1 MLJ 302, SC (refd)

Guan Soon Tin Mining Co v Wong Fook Kum [1969] 1 MLJ 99, FC (refd)

Sum Kum v Devaki Nair & Anor [1964] 1 MLJ 74, FC (refd)

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Legislation referred to

Contracts Act 1950 ss 22, 55, 56
Courts of Judicature Act 1964 ss 69(1), 72
Evidence Act 1950 ss 102, 103

Appeal from: Suit No MT3–22–1713 of 2006 (High Court, Shah Alam)

Sukhdev Singh Randhawa (Muhamed Fariz bin Mohd Ali with him)(Azlan Shah Sukhdev & Co) for the appellant.
Indrani Marimuthu (Jamaludin Ibrahim & Assoc) for the respondent.

Abdul Wahab Patail JCA (delivering judgment of the court):

[1] The appellant, Juta Damai Sdn Bhd, appealed to this court against the decision of the High Court given on 29 February 2012. The High Court had dismissed the appellant's claim against the respondent, Permodalan Negeri Selangor Bhd, with costs.

[2] The appellant and the respondent had entered into a joint venture agreement dated 7 April 1995 ('the JVA') and a supplementary agreement dated 15 May 1996 under which the appellant was to undertake a housing, commercial and industrial development including public amenities and infrastructure on a piece of land of 70 acres held under Lot 5317, Mukim Dengkil, District of Sepang, Selangor. Through its solicitor's letter of 2 July 2001, the respondent informed the appellant that the joint venture agreement had expired on 6 April 2001 and would not be renewed. On 21 December 2006, the appellant filed its civil suit.

APPEALS GENERALLY

[3] By s 69(1) of the Courts of Judicature Act 1964 ('Act 91') , appeals to this court are by way of re-hearing. To ensure appeals are bona fide and not mere attempts for a second bite at the cherry, it is trite law that unless it is demonstrated that the court appealed from had erred in law, principle, fact or appreciation of facts, and that such error affected the merits or jurisdiction of the court (see s 72 of the Act 91), any intervention by an appellate court is unwarranted. An unwarranted intervention is an interference.

[4] We examined the grounds of judgment of the High Court accordingly.

THE WITNESSES

[5] Having set out a brief background of the civil suit and cll 2(i), 2(v), 2(vii), 2(ix), 3(ii), 4(i) and 18 of the JVA, the High Court correctly stated that:

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Pursuant to the joint venture agreement, the plaintiff had submitted the lay out plans to the relevant authorities for approval. The lay out and pre com plans were approved vide letters dated 28.2.1996 and 5.4.1996 and the building plan was approved vide letter dated 20.9.199[6].

It is the plaintiff's case that they are not able to start preliminary works such as survey works to prepare the earthworks plan, the drainage and road plans as the land was occupied by a third party known as Kazabina Sdn Bhd, carrying out sand mining activities.

[6] Then the High Court summed up the evidence of SP1 Encik Kenny Lim @ Lim Kah Joo who had:

(a) referred to the appellant's letters of 18 April 1995, 3 May 1995, 29 February 1996 and 1 October 1996 and testified that several complaints were made to the respondent on the sand mining activities and for the respondent to give vacant possession of the land to the appellant in order for them to carry out the said development;

(b) referred to the appellant's letters of 5 March 2001 and 5 April 2001 where the appellant proposed to the respondent to convert the development of housing and industrial into a mixed housing development;

(c) contended that the termination was wrongful; that the respondent had breached the JVA in failing to deliver vacant possession of the land and that the appellant suffered losses amounting to RM5,504,527.49 being the expenses incurred by the appellant for the preliminary works in respect of the development; and loss of profit in the sum of RM21,486,263.75, based on the appellant's entitlement under the supplementary agreement for houses, buildings and/or land lots amounting to RM52,341,263.75 minus the estimated costs of the development.

[7] In respect of the expenses incurred in the sum of RM5,504,527.49, the High Court summarised his testimony as follows:

... SP1 in his evidence referred to several letters/ invoices issued by third parties. These documents show the quotation for the survey (RM206,294.50); claim for legal fees for the preparation and stamping of the agreements (RM4620.00); engineer's fees (RM 1,108,000.00); planning fees and printing (RM6,170.00); architects fees (RM 1,290,044.00); site investigation and soil analysis (RM20,000.00); market feasibility study (RM105,000.00); fees for processing building plans (RM429,117.00) and management consultant fees and marketing costs (RM2,335,281,89). SP1 did not refer to any receipts to show payment of the costs and expenses stated above.

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[8] Then the High Court referred to the evidence of other witnesses for the appellant.

[9] SP2, Mr Lim Kah Chai, a partner of *Jurutera Perunding* KPR, testified that *Jurutera Perunding* KPR had charged the plaintiff RM554,000 for the professional fees, and who explained that the receipts and other documents were destroyed as they do not keep accounting records for more than six years.

[10] SP3, Miss Susan Lim Mei Peng, the General Manager of LCK Holdings Sdn Bhd, testified that her company was appointed as consultant to undertake sales and marketing and admin and project management. She testified that LCK issued 21 progress payment claims to the appellant and as at 4 December 2009 the total sum of management consultant fee owed by the appellant was RM1,804,281.59, of which only progress claims Nos 1–3 amounting to RM370,500 were paid.

[11] SP4, Miss Yang Sook Pen of Nesa Akitek, testified that the appellant appointed Nesa Akitek as the project architect to prepare all architecture and building plans for the project on the said land. SP4 referred to an invoice dated 24 December 1996 issued to the appellant for the amount of RM1,290,044.00. The High Court observed that SP4 too gave the same answer as SP2 and SP3 when asked on the proof of payment, ie that the receipts issued were destroyed as Nesa Akitek does not keep accounting records for more than six years.

[12] SP5, Encik Mohd Yusoff bin Ismail, an engineer, testified that Berkat Consult was appointed as town planner to study and prepare layout, market feasibility report and to follow up the layout until endorsement for the project and that the professional fees for the services rendered to the appellant was RM107,000. SP5 referred to an invoice showing the lump sum fees of RM105,000 and he also said that Berkat Consult no longer have in their possession the receipts issued to the appellant.

[13] The High Court then turned to the respondent's defence that there was no wrongful termination of the JVA. The sole witness for the respondent was SD1, Encik Md Yunus @ Iskandar bin Md Noor, a project manager with the respondent. The High Court summarised his testimony as follows:

> ... [SD1] admitted that there were sand mining activities on the land but said that the permit was given periodically so that the defendant can monitor the activities and gave vacant possession to the plaintiff when the plaintiff is ready to commence development.
>
> [SD1] further testified that the joint venture agreement lapsed on 6.4.2001 and that there was no application for extension by the plaintiff. It was further his evidence that the plaintiff was not serious in carrying out the project on the said land. Only

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at the last minute did the plaintiff apply to convert the development plan from industrial to mixed housing development.

THE FINDINGS ON LIABILITY

[14] Then the High Court proceeded to its findings.

[15] First, it took into consideration that after 1996 the appellant had not written to complain further of the sand mining activities and its later communication was to request a revision from industrial to mixed housing development:

> ... Whilst I accept that in 1995 and 1996 the plaintiff had complained to the defendant about the sand mining activities, there is no letter to show that thereafter, until 2001, the problem persisted such that the plaintiff was not able to enter the land and start with the project.
>
> The documentary evidence shows that in March 2001, one month before the expiry of the joint venture agreement, the plaintiff had written to the defendant. The subject of the letter dated 5.3.2001 (exhibit P19) was not about the defendant failing to perform its obligation under the joint venture agreement but the letter was to request for the conversion of the development from industrial to mixed housing development.
>
> It must be emphasized that the above letter makes no mention of the defendant's failure to give vacant possession. Neither did it mention about the sand mining activities. I find it inherently improbable that the plaintiff would not mention about the defendant's breach and/or the vacant possession or the sand mining activities which results in the plaintiff's inability to perform under the joint venture agreement, if that was indeed the case.
>
> Contrary to the stand taken by the plaintiff that they could not start because the defendant failed to give vacant possession, the above letter gives an account of the actual reason why the plaintiff did not commence development i.e. because they had a real concern that there is no sufficient demand for the industrial premises. The plaintiffs failure to start has nothing to do with sand mining activities or vacant possession.
>
> It is to be noted that the reason given in the plaintiffs letter dated 5.3.2001 on the insufficient demand for the industrial premises is consistent with the position taken by the plaintiff since 1997. Vide a letter dated 8.9.1997 (exhibit P34) to the then Menteri Besar of Selangor requesting for extension of time to pay the premium, the plaintiff wrote ' ... memandangkan pada masa sekarang permintaan untuk perindustrian ringan tidak menggalakkan, kami akan menghadapi kesukaran untuk menjual bangunan- bangunan sekiranya dibina pada masa sekarang ... '

[16] In this regard, the High Court failed to appreciate that after the initial phase of planning for a rather large development of 70 acres, the appellant needed to have vacant possession for site surveys before proceeding to site preparations and to begin construction. A site survey to determine the

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contours, ie elevations, is particularly essential in the light of sand mining operations. Performance of the appellant's obligations under cl 2(i) of the JVA required vacant possession or at least access, and that there be no further earthworks as would change the contours and elevations. The parties in the JVA recognised the importance of this and agreed to vacant possession within six months. The High Court failed to appreciate that although there was a slight delay in the issue of the initial approvals, the appellant had written the very next day after the first approval was issued on 28 February 1996 for vacant possession. Thus, though there may be less useful complaint of vacant possession not being given on 7 October 1996 ie exactly six months from the date of the JVA and the respondent could continue issuing short term sand mining licences, the High Court failed to appreciate that there was no further excuse to withhold vacant possession after the appellant's letter of 29 February 1996 where the appellant, inter alia, complained of continued sand mining activities, damage to the terrain, denial of access and sought vacant possession:

> 3 Oleh itu sepertimana yang dicatatkan dalam 'joint venture agreement' bertarikh 7hb April 1995 (satu salinan dilampiran B) penyerahan milik kosong tanah akan diberi dalam tempoh 6 bulan selepas ditandatangani perjanjian. Tetapi sehingga hari ini pihak kami sedang menunggu tindakan tuan memberi penyerahan tanah, berhentikan kegiatan mengambil pasir dan membatalkan permit bagi membolehkan pihak kami memulakan kerja-kerja seperti meratakan tanah ini tanpa gangguan dan sekatan, serta membenarkan Jurukur Perunding kami melaksanakan dan menyiapkan pelan kontor infrastruktor yang mana kerja-kerja ini telah beberapa dilakukan.
>
> 4 Disini kami ingin menarik perhatian tuan Jurukur kami telah beberapa kali memasuki ketanah ini untuk memulakan kerja tetapi telah diganggu dan disekat oleh beratus-ratus pemandu-pemandu lori pasir, beberapa jentera mengorek pasir ini menyebabkan mukabumi ditapak ini berubah-ubah kerana terdapatnya mesin pencuci pasir dan kolam-kolam yang dalam.

[17] The High Court failed to appreciate that where substantial delays occurred in a development project, it necessarily affects the completion date. By the time the letter of 8 September 1997, vacant possession was delayed by almost two years and it was about two years five months from the date of the six year term of the JVA.

[18] At that point, the development necessarily needed revision.

[19] The reasoning of the High Court then proceeded as follows:

> Further, if the plaintiff could not start the development for the reason that the defendant failed to give vacant possession, there seems to be no logic in the plaintiffs

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request to convert the development from industrial to mixed housing. Be it industrial or housing, the plaintiff would not be able to develop the land if there is no vacant possession.

Given all the above, I find that the delay and the real reason why the plaintiff was not ready to commence development as established by the contemporaneous documentary evidence is because of the lack of demand for the industrial premises.

Since the sand mining and vacant possession were not the reason for the plaintiffs failure to commence development, the defendant could not be said to be in breach of the joint venture. Thus the defendant's letter dated 2.7.2001 informing the plaintiff that the agreement had expired on 7.4.2001 is not wrongful. It follows that there is no issue of the plaintiff claiming for damages from the defendant for breach of the joint venture agreement.

[20] Under those circumstances of substantial delay, seeking for a revision of the development to mixed housing may have been part of the solution. The appellant has, in any case, a right to ask and it should not be held against the appellant to have done so. Though this was not addressed by the parties, it does not warrant dismissal of the ground of breach of cl 3(iii) merely because a revision was sought. Likewise, we do not think that the fact the appellant was still seeking a revision at the time the six year term of the JVA was about to end warrants a dismissal of the ground of breach of cl 3(iii) of the JVA. We observe that although at the beginning the grounds of judgment had referred to cl 3(iii) of the JVA, no further mention was made of it.

[21] The cl 3(iii) of the JVA provided that the respondent 'shall give vacant possession of the Land to the Company within six (6) months of the execution of this agreement.' The 'Company' referred to is the appellant herein. The vacant possession was to have been given by 6 October 1995.

[22] The High Court made a finding that:

... Whilst I accept that in 1995 and 1996 the plaintiff had complained to the defendant about the sand mining activities, there is no letter to show that thereafter, until 2001, the problem persisted such that the plaintiff was not able to enter the land and start with the project.

[23] It had been specifically pleaded at paras 9 and 10 of the statement of claim:

9 Plaintif dan/atau wakilnya mendapati kerja-kerja mengorek pasir, memproses pasir halus dan melombong biji timah dan sepertinya sedang giat dijalankan oleh beberapa pihak ketiga yang telah diberi kebenaran oleh Defendan sendiri dan/atau wakilnya. Jentera-jentera dan bangunan ('structures') berkenaan dengan kegiatan-kegiatan tersebut adalah berada di atas tanah tersebut.

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10 Pihak Plaintif dan/atau wakilnya tidak dibenarkan dan/atau dihalang dan memasuki tanah tersebut oleh para pengusaha tersebut yang menggunakan dan/atau menguasai tanah tersebut. Plaintif dan/atau wakilnya telah dihalang oleh pihak ketiga dan/atau wakilnya daripada memulakan apa-apa kerja di tanah tersebut.

11 Oleh yang demikian, Plaintif tidak dapat memulakan kerja-kerja awalan di atas tanah tersebut walaupun pada semua masa yang material Plaintif ingin dan bersedia melaksanakan Perjanjian tersebut dan membangunkan tanah tersebut.

12 Walaupun Plaintif telah memaklumkan beberapa kali secara lisan dan bertulis tentang kegiatan mengambil pasir dan kegagalan Defendan menyerahkan milikan kosong tanah tersebut namun sehingga hari ini Defendan masih gagal, ingkar dan/abai untuk menyerahkan milikan kosong tanah tersebut kepada Plaintif.

[24] Paragraph 6 of the appellant's letter of 29 February 1996 was crystal clear in seeking compliance with the JVA as to handing over vacant possession:

> 6 Sehubungan dengan ini, diharap dapat kerjasama pihak tuan menyerahkan milik kosong tanah ini kepada kami sepertimana didalam perjanjian usaha sama seberapa cepat yang boleh. Kerjasama tuan didalam hal ini diucapkan ribuan terima kasih.

[25] The High Court, notwithstanding that it had summed up the testimony of SD1 as admitting to the carrying on of the sand mining activities, failed to appreciate that SD1 did not testify that the sand mining activities had stopped or when it had stopped. Only such testimony would have answered the pleaded case and the evidence of the appellant.

[26] The vacant possession was sought to enable the surveyors to conduct survey of the land to enable the appellant to proceed with site preparations and designs before contracting and construction can begin. The failure to give vacant possession is also evidenced by letters dated 18 March 1996 and 28 April 1996 written by the appellant's consultant engineers. Those letters described extensive large scale activities and consequences upon the land.

[27] The High Court had also failed to appreciate that it was not the respondent's defence that vacant possession had been given at any time. Therefore, a breach of the JVA by the respondent was not a disputed fact. But ignoring its own breach, and for which it provided no explanation, the respondent relied upon s 56 of the Contracts Act 1950 (Act 136) as to failure to perform at fixed time where time is essential. The respondent ignored the fact that cl 20, that time was of the essence, equally applied to its own obligation under cl 3(iii) to give vacant possession within six months of the execution of the JVA:

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20 TIME OF THE ESSENCE

Time wherever is a requirement in this Agreement shall be of the essence.

[28] This led the High Court astray, causing failure to appreciate the facts correctly and led the High Court to the failure to consider s 55 of the Act 136 as to breach by the respondent of its reciprocal promise to give vacant possession:

> When a contract consists of reciprocal promises, such that one of them cannot be performed, or that its performance cannot be claimed till the other has been performed, and the promisor of the promise last mentioned fails to perform it, the promisor cannot claim the performance of the reciprocal promise, and must make compensation to the other party to the contract for any loss which the other party may sustain by the nonperformance of the contract.
>
> ILLUSTRATIONS
>
> (a) A hires Bs ship to take in and convey, from Kelang to Singapore, a cargo to be provided by A, B receiving a certain freight for its conveyance. A does not provide any cargo for the ship. A cannot claim the performance of Bs promise, and must make compensation to B for the loss which B sustains by the nonperformance of the contract.
>
> (b) A contracts with B to execute certain builders' work for a fixed price, B supplying the scaffolding and timber necessary for the work. B refuses to furnish any scaffolding or timber, and the work cannot be executed. A need not execute the work, and B is bound to make compensation to A for any loss caused to him by the nonperformance of the contract.
>
> (c) A contracts with B to deliver to him, at a specified price, certain merchandise on board a ship which cannot arrive for a month, and B engages to pay for the merchandise within a week from the date of the contract. B does not pay within the week. As promise to deliver need not be performed, and B must make compensation.
>
> (d) A promises B to sell him one hundred bales of merchandise, to be delivered next day, and B promises A to pay for them within a month. A does not deliver according to his promise. B's promise to pay need not be performed, and A must make compensation.

[29] Illustration (b) amply demonstrates the application of s 55: if the respondent fails to give vacant possession within six months or at least when requested on 29 February 1996, the appellant need not execute the JVA and was entitled to compensation for loss caused by the non-performance by the respondent. The facts subsequent to the non-performance by the respondent of cl 3 (iii), the appellant did not proceed to execute the JVA by the end of the six year term of the JVA under cl 18, that time was of the essence under cl 20 or the appellant sought to have a revision of the development to mixed housing, are irrelevant.

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[30] In *Dial Kaur a/p Tara Singh v Mann Foong Realty Sdn Bhd* [2000] 3 MLJ 153; [2000] 4 CLJ 93 (CA), it was held by this court, at p 160 (MLJ); p 99 (CLJ), para e-f that:

> In our judgment the non-performance of the plaintiffs promise to pay the bank in full and to recover all the 31 titles from the bank is fatal to its case. If the plaintiff failed to perform its promise in para (d), it could not claim the performance of the reciprocal promise by the defendant in para (c): see s 55, Contracts Act 1950. If the plaintiff was not entitled to make such a claim against the defendant till its own obligation in para (d) had been performed then his action against the defendant must surely fail ...

[31] The non-performance of the respondent's reciprocal promise to give vacant possession within six months, or at least when requested by the appellant, which must be first performed before the appellant could be expected to proceed further with the surveys, earthworks, other preparations before proceeding with the development, disentitled the respondent from asserting that the appellant failed to perform its part of the bargain. As submitted by counsel for the appellant in the High Court from D Keating in his book 'Building Contracts', where one party has failed to perform a condition of the contract, the other party cannot rely on its non-performance if it was caused by his own wrongful acts (see also *Gimstern Corporation (M) Sdn Bhd & Anor v Global Insurance Co Sdn Bhd* [1987] 1 MLJ 302 (SC)).

[32] We hold that, in taking into consideration against the appellant that the appellant had, by its letters of 18 September 1997, 5 March 2001 and 5 April 2001, sought consideration for a revision of the development to mixed housing, the High Court had taken into consideration irrelevant considerations which affected the merits of its decision warranting intervention under s 72 of the Act 91.

THE CLAIM FOR SPECIAL DAMAGES AND LOSS OF PROFITS

[33] In respect of the claim for special damages and loss of profits, the High Court held:

> Even if I were to consider the plaintiff's claim for special damages and the loss of profits, I find that the plaintiff has failed to prove the same.
>
> The plaintiff's claim for special damages in the sum of RM5,504,527.49 is for the expenses allegedly incurred in the appointment of engineers, architects, surveyors and consultant for Management Company pursuant to the joint venture agreement.
>
> The appointments of consultants and technical staff were the obligation of the plaintiff as stipulated under clause (xxxiii) of the joint venture agreement. This obligation in my view would necessarily include the obligation to bear the expenses in appointing them. Indeed, as submitted by learned counsel for the plaintiff, for

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commercial development, the developer ie the plaintiff has to bear the costs and the land owner ie the defendant provides the land only. The professional fees should rightly be borne by the plaintiff.

SP1 had said that the fees incurred for Jurutera Perunding KPR was RM1,108,000 which is the amount stated in the Jurutera Perunding KPR's letter. From the evidence of SP1, the plaintiff is claiming for the full amount stated therein. However, according to SP2, who was the engineer from Jurutera Perunding KPR, the fees charged by Jurutera Perunding KPR was RM554,000 as the plaintiff had been given a discount. Therefore RM1,108,000 was not the expenses incurred by the plaintiff for the professional fees for the engineers and the claim for RM5,504,527.49 which includes this RM1,108,000 is clearly erroneous.

All the witnesses (SP2, SP3, SP4 and SP5) are consistent in their answers that they do not keep documents for more than six years. While their evidence sought to establish that the plaintiff had paid for the fees/invoices, they could not show proof of payment made by the plaintiff due to the aforesaid reason.

The fees and/or invoices involved substantial amounts. If at all payments had been made by the plaintiff to the various third parties for the fees and/or invoices, it is inherently improbable that receipts were not issued to the plaintiff. Thus, even if the third parties do not have the receipts, I find it strange that the plaintiff, whilst being able to produce letters and invoices from the third parties dated in 1995 until 1998, is not able to produce the receipts to show that payments were in fact made for those claims/invoices. I therefore find that the claim for the expenses incurred is doubtful or illusory (see *Sang Lee Co Sdn Bhd v Suburamaniam a/l Mayawan & Ors* [2011] 5 MLJ 374; [2011] 2 AMR 721).

As regards the loss of profits, the plaintiff's letter dated 5.3.2001 states 'secara kolektifnya, masalah yang dihadapi sekarang oleh pihak kami adalah berdasarkan kesukaran di dalam menjalankan penjualan terhadap premis-premis industry yang mana langsung tidak mempunyai permintaan yang sewajarnya.' I am of the view that there is no basis to allow the plaintiff's claim for loss of profits when the plaintiff has admitted that there is no demand for the industrial premises to be built. In the absence of demand, the project even if commenced by the plaintiff, would not have given the plaintiff the expected profits.

To conclude, I find that the plaintiff has failed to prove its case that the defendant has breached the joint venture agreement and the plaintiff has also failed to prove the losses pleaded in the statement of claim. The plaintiff's claim is dismissed with costs of RM20,000.

[34] Section 102 of the Evidence Act 1950 (Act 56) provides that the burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side. That burden quite clearly falls upon the appellant. Section 103 provides that burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

[35] We make these observations. First, it does not require the defendant to be satisfied, otherwise defendant could avoid having to pay compensation by

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never being satisfied. Secondly, it follows that the test, for all parties, is not subjective but objective. It is, therefore, a matter of the evidence adduced being placed upon the 'balance of probabilities' which will determine in which direction the scales on that balance tilts.

[36] We address the question of special damages.

[37] The appellant had pleaded in respect of special damages:

YURAN PROFESSIONAL	
Fee Jurukur	RM206,294.50
Fee Peguam	RM4,620
Jurutera	RM1,108,000
Fee Perancang & Fee Printing	RM6,170
Arkitek	RM1,290,044
Kajian Pemeriksaan Tapak & Pemeriksaan Tanah	RM20,000
Report 'Market Feasibility Study'	RM105,000
Proses Pelan Bangunan	RM98,117.10
Bangsal (Pelan Bangunan)	RM12,000
Cagaran (Pelan Bangunan)	RM319,000
Fee Pengurusan 8s Kos Pemasaran	RM2,335,281.89
JUMLAH	RM5,504,527.49

[38] These are services clearly connected with the type of development being undertaken under the JVA. The appellant had in this case produced, in respect of the claim for special damages, witnesses to testify to invoices issued for engineers, architects, surveyors and consultant for management company. These were itemised. They were charged by third parties, and not internal costs of the appellant. They could be checked and verified by the respondent as to truth and accuracy. There was no evidence adduced by the respondent that they had done so and found any to be untrue or incorrectly stated.

[39] The defence in respect of the claim for special damages was not that they were unconnected with the development, but that the expenditures if true and was proved, were the obligation of the appellant under the JVA. The defence overlooks s 22 of the Act 136. Section 55 entitles the appellant to claim compensation for any loss suffered. The items of special damages were losses suffered that were identifiable and particularised. That these costs were costs to be borne by the appellant if the joint venture development had proceeded was no answer to the right conferred under s 55 to the appellant to compensation for losses suffered when the development under the JVA could not be carried

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out because of the breach by the respondent. The essence of the losses were that they were losses suffered by the appellant from the breach by the respondent of cl 3(iii) when the appellant was unable to proceed with the JVA and to recover these expenditures from the proceeds from the joint venture.

[40] Returning to the question of proof, we observe that there is no provision that requires that such loss is only proveable by production of receipts. The best evidence rule requires proof not by the 'best evidence' but by the 'best evidence available'. The unavailability of receipts was explained on the grounds the receipts were not kept for more than six years. The explanation is not inherently implausible. That all the witnesses gave the same explanation is a dubious ground of rejection for it is a common practice and the witnesses were all third parties having nothing to do with the appellant's litigation until called as witnesses. It was not challenged that the practice of not keeping receipts for more than six years is not applicable to their particular profession or business. Their evidence was supported by invoices they had issued. We cannot dismiss the evidence as frivolous.

[41] We find that the probabilities of the appellant's claim on quantum were based on evidence of witnesses whose testimony were not strongly challenged and were not discredited by cross-examination, and supported by invoices. The respondent's case was only a challenge to prove it, and that they were costs under the JVA to be borne by the appellant. In other words, there was nothing placed in evidence by the respondent on its side of the scale on the 'balance of probabilities' that such expenses were not incurred. Thus, placed upon the 'balance of probabilities' and however much the evidence adduced by the appellant was sought to be doubted, the scales tilt in favour of the appellant when there is nothing placed on the scale for the respondent.

[42] We hold that the High Court erred in dismissing the claim for special damages in the sum of RM5,504,527.49. However, since SP2 testified the *Jurutera Perunding* fee of RM1,108,000 was reduced to RM554,000, the loss suffered was that much less. We adjust the sum of RM5,504,527.49 to RM4,950,527.49.

[43] As to the loss of profits, the appellant had pleaded:

> 12 Plaintif juga telah kehilangan keuntungan sejumlah RM21,486,263.75 disebabkan oleh penarikan balik, penamatan secara unilateral dan/atau kemungkiran terma-terma Perjanjian tersebut oleh Defendan.

[44] That this is necessarily based upon estimates cannot be a ground for dismissal because the project was not able to be commenced. Actual figures, therefore, were not available. We examined how and on what basis the amount was arrived at.

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[45] The appellant relied upon an estimated cost of implementation of RM30,527,333.53, estimated sales proceeds of RM52,341,263.75 to arrive at a gross profit of RM21,813,930.22.

[46] Clause 4 of the JVA specified, inter alia, that the entitlement of the respondent would be as set out in a supplementary agreement. Clause 2 of the supplementary agreement provides:

> 2 The parties hereto agree that the Company shall allocate, deliver and transfer to the Corporation the houses and/or buildings and/or the land lots in the Housing Development as set out in accordance with the terms and conditions of this supplementary agreement. Clauses 3 and 4 provided as to the type and total number of units of houses and/or buildings to be constructed and/or the land lots developed. Clause 5 provided for the entitlements of the parties.

[47] Clause 5(a) provided alternatively:

> Or alternatively the Company shall pay to the Corporation the amount of money stated in the Second Schedule hereto in lieu of the Corporation's Entitlement and the payment to be made in accordance with the Schedule of payment specified in the Third Schedule hereto.

[48] Clause 5(b) provided:

> (b) The Company and the Corporation hereby agree that should the layout plan of the Housing Development on the said Land be altered, varied or otherwise amended by the State Authorities pursuant to clause 2(iv) of the Principal Agreement thereby causing an increase or decrease in the number of housing units or change in the houses of buildings to be constructed and/or land lots be developed for the said Housing Development, the Company and the Corporation shall immediately thereupon negotiate to determine the revised allocation for the Corporation by reference and adopting the various percentages set out in the First Schedule annexed hereto as the basis for the re-calculation.

[49] The Second Schedule provided:

> SECOND SCHEDULE AMOUNT OF CORPORATION'S ENTITLEMENT (SECTION 5) RINGGIT MALAYSIA: FOUR MILLION TWO HUNDRED FORTY THREE THOUSAND EIGHT HUNDRED EIGHTY SIX AND TWENTY FIVE CENTS ONLY.

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[50] The supplementary agreement had, therefore, clearly provided that the equivalent of the respondent's entitlement was RM4,243,886.25. This figure accords with the value accorded to the units the respondent was entitled to. On the date of signing of the supplementary agreement, a letter of indemnity was required to be signed by the directors of the appellant as guarantors. The significance is that cl 5(a) provided that in the event the respondent's entitlements to units were not handed over to the respondent, the appellant's obligation was settled by the payment of RM4,243,886.25. Since the sum was fixed and not determined by market values at the time of default, the figures were accepted by the parties to the JVA and the supplementary agreement and was binding upon them. It was not a mere estimate. Hence, the appellant is entitled to rely upon this accepted sum as the best available evidence when proof of actual loss is not available in the determination of the loss of gross profit suffered. These agreements were not disputed and were before the High Court. There was evidence before the High Court of the loss. This is not a case of the appellant merely writing down the particulars and throwing the same at the head of the court as proof of the damages suffered (see *Sum Kum v Devaki Nair & Anor* [1964] 30 MLJ 74 (FC)). It cannot, therefore, lead to an award merely of nominal damages as in *Guan Soon Tin Mining Co v Wong Fook Kum* [1969] 1 MLJ 99 (FC). In our view, the High Court was led to error to hold that the appellant had failed to prove loss of profits of RM21,813,930.22.

[51] We consider next whether the loss of profits to be awarded remains at the sum of RM21,813,930.22. Though parties agreed as we concluded above, what the profits were from the joint venture and determined how it was to be shared, and that the share of the respondent is fixed at RM4,243,886.25, the appellant's written evidence had asserted at reduced viability. However, there is no evidence at all by what factor or percentage the profitability is reduced. We do not think however that because there is no evidence by how much the profitability was reduced, no loss of profits should be awarded. In such a case, it is for the court to nominate a figure to set the nominal reduction. We, therefore, fix that nominal reduction at 30%.

[52] We, therefore, set aside the order of the High Court and enter judgment for the appellant in the sum of RM4,950,527.49 as special damages, and RM21,813,930.22 less 30% as loss of profit, and interest at 8%pa from 7 April 2001 to date of full settlement. We award costs in the sum of RM20,000 unless otherwise agreed.

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Appeal allowed.

Reported by Afiq Mohamad Noor